Office-Supreme Court, U.S.
FILED
APR 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1538

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, et al.,
and
STATE OF TEXAS

Appellants

vs.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, et al.,

Appellees

On appeal from the United States Court of Appeals for the Fifth Circuit

Motion to Dismiss or Affirm

LAW OFFICE OF LARRY DAVES
Attorney at Law
P.O. Box 1115
Tyler, TX 75710
(214) 593-0184

VILMA S. MARTINEZ
PETER D. ROOS—Counsel of Record
Mexican American Legal Defense and Educational Fund (MALDEF)
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800

Attorneys for Appellees

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities Cited	ii
I. Reported Decisions	1
II. Statutes Involved	2
III. Argument	
A. The Appeal Should Be Dismissed	2
B. The Decision of the Court of Appeals Should Be Summarily Affirmed. The Clear Language of the Equal Protection Clause Compels the Finding That Undocumented Aliens Are Protected by Its Provisions	2
C. The Decision of the Court of Appeals Should Be Summarily Affirmed. This Statute Violates the Equal Protection Clause Irrespective of the Standard Utilized	6
IV. Conclusion	7

TABLE OF AUTHORITIES CITED

Cases	Pages
Bolanos v. Kiley, 509 F.2d 1023 (2nd Cir. 1975)	6
Carlisle v. U.S., 16 Wall. 147 (1872)	3, 4
Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978)	1
Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980)	1
Hernandez v. Houston Ind. School Dist., 558 S.W.2d 121 (Tex. Civ. App. — Austin, 1977, writ ref'd N.R.E.)	6
Holly v. Lavine, 529 F.2d 1294 (2nd Cir. 1975)	6
The Japanese Immigrant Case, 189 U.S. 86 (1902)	5
Johnson v. Eisentrager, 339 U.S. 763 (1950)	4
Kleindienst v. Mandel, 408 U.S. 753 (1972)	4
Mathews v. Diaz, 426 U.S. 67 (1976)	5
Shaugnessy v. U.S. ex rel Mezei, 345 U.S. 206 (1953)	5
United States v. Tsuda Maru, 479 F. Supp. 519 (D. Alas. 1979)	6
Williams v. Williams, 328 F. Supp. 1380 (D. V.I. 1971)	5
Wong Wing v. United States, 163 U.S. 228 (1896)	5
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	4, 5

CONSTITUTIONS, STATUTES AND TREATIES

Pages

U.S. Constitution:
Article VI, Clause 2 2
5th Amendment 5, 6
14th Amendment 2, 4, 5

STATUTES

Rules of the Supreme Court of the United States, Rule 15 (1)(j)(iv) 2

Texas Education Code, Section 21.031 (Vernon. Supp. 1976) 6

No. 80-1538

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES PLYLER, Superintendent of the Tyler Independent School District and its Board of Trustees, et al.,
and
STATE OF TEXAS

Appellants

vs.

J. AND R. DOE, as Guardian Ad Litem for I. DOE, et al.,

Appellees

On appeal from the United States Court of Appeals for the Fifth Circuit

---

Motion to Dismiss or Affirm

I.

REPORTED DECISIONS

The opinion of the District Court is reported at 458 F. Supp. 569 (E.D. Tex. 1978). The decision of the Court of Appeals affirming the ruling of the District Court is reported at 628 F.2d 448 (5th Cir. 1980).

II.

STATUTES INVOLVED

In addition to those statutes set forth in the Jurisdictional Statement the following are involved:

(a) Tyler (Tex.) Independent School District Policy, which states: The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens and who are residents of this school district free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee.

(b) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(c) The Supremacy Clause of the United States Constitution, Article VI, Clause 2.

III.

ARGUMENT

A. The Appeal Should Be Dismissed.

This Appeal should be dismissed for the Jurisdictional Statement does not comply with this Court's Rules. The Jurisdictional Statement is defective because a copy of the Notice of Appeal is not appended to it, contrary to the requirements of Rule 15 (1)(j)(iv).

B. The Decision of the Court of Appeals Should Be Summarily Affirmed. The Clear Language of the Equal Protection Clause Compels the Finding That Undocumented Aliens Are Protected by Its Provisions.

While this court has never directly ruled that undocumented aliens are protected by the equal protection clause, the clear language of that provision, this Court's rulings on its companion, the due process clause, and simple logic com-

pel summary affirmance of the Court of Appeals on this issue.

The Fourteenth Amendment prohibits a state from denying equal protection of the laws to "any person within its jurisdiction". At prior junctures of this litigation, the state has argued that an undocumented alien is not a "person" for purposes of equal protection. Since "persons" are protected by the due process clause and since this Court has regularly ruled that undocumented aliens are persons within that companion clause, the state no longer advances that claim. As will be discussed, *infra*, they make a wise choice. The new claim advanced is that the term "within its jurisdiction" is not found in the due process clause. Thus, it is argued, the cases decided under that clause are inapposite. This argument and its conclusion that the equal protection clause therefore does not protect undocumented aliens *even when* they are within a state's territory fails for several reasons. First, the case law does not reflect any differential treatment of the scope of these clauses based on this language; rather, this Court and others have consistently considered coverage to be coextensive. Secondly, the simple language of this provision is logically construed to mean merely that insofar as a state has power ("jurisdiction") over an individual, it must accord him equal protection. Finally, it is a fundamental principle of law, as articulated by this Court for more than one hundred years, that the basic principles of American law attach to those within its territory; conversely, aliens without the geographical territory of the United States are not so protected.

Setting forth the principle that the basic protections of this country attach to even those who are transitorily within the United States is *Carlisle v. United States*, 16 Wall. 147 (1872). This Court in *Carlisle* ruled that,

> The rights of sovereignty . . . extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence in transitory. *All strangers are under the protection of the sovereign while they are within his territories* and owe a temporary allegience in return for that protection.
>
> 16 Wall. 147, 154 (emphasis added).

This principle that basic protections adhere to all within the territory of the state as distinguished from those physically external is repeated in various rulings of this Court. Recent decisions discussing this principle include *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

More directly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court expressly ruled that the term "persons within the jurisdiction" as found in the equal protection clause applies to *all* within the territorial confines of a state. As the Court stated,

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. *These provisions are universal in their application to all persons within the territorial jurisdiction.*
>
> 118 U.S. 356, 369 (emphasis added).

The Plaintiffs in *Yick Wo* were Chinese aliens seeking protection against a discriminatory licensing policy. While the Court found no need to discuss the legal status of the aliens in *Yick Wo*, its statement of legal principle is clearly

not limited by status. This was made clear in a subsequent ruling in which this Court cited the entirety of the *Yick Wo* statement in upholding the rights of undocumented aliens to due process protections. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

Wong Wing has been repeatedly cited in upholding the rights of undocumented aliens to due process protections. Recently, in *Mathews v. Diaz*, 426 U.S. 67 (1976), this Court observed that,

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment protects every one of these persons from deprivation of life, liberty, or property without due process of law . . . *Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection.*
>
> 426 U.S. 67, 77 (emphasis added). See also *The Japanese Immigrant Case*, 189 U.S. 86 (1902); *Shaugnessy v. U.S. ex rel Mezei*, 345 U.S. 206, 212 (1953).

In effect, the Petitioners ask this Court to overrule *Wong Wing* and the foundational support for it found in *Yick Wo*, and to revise eighty five (85) years of precedent. Such a request is properly denied by summary affirmance of the lower court's rulings.

Solace to the Petitioners is not found in any divided authorities among the circuits. Those courts which have been compelled to address the question have ruled that basic equal protection protects all aliens within the territory of the United States irrespective of legal status. See e.g., *Williams v. Williams*, 328 F. Supp. 1380, 1383 (D.V.I. 1971)

Bolanos v. Kiley, 509 F.2d 1023, 1025 (2nd Cir. 1975), *Holly v. Lavine*, 529 F.2d 1294, 1296 (2nd Cir. 1975).[1]

In sum, no need for further clarity is required of this Court. Summary affirmance is appropriate.

C. The Decision of the Court of Appeals Should Be Summarily Affirmed. This Statute Violates the Equal Protection Clause Irrespective of the Standard Utilized.

In their argument, the Petitioners fail to identify any findings of fact or conclusions of law which would support their contention that the State of Texas properly justified the exclusion of undocumented children from their schools. There was, in fact, a dearth of justification. The two lower courts in this case have found what "facts" were offered to be little more than arguments. Given the obvious inability of the Petitioners to identify failures of findings by the courts below, summary affirmance is appropriate. This is especially so given the fact that the courts were able to reach their conclusion without reliance upon a standard of strict scrutiny.

---

1. The Petitioners cite *United States v. Tsuda Maru*, 479 F. Supp. 519 (D. Alas. 1979) as providing contrary authority. The *Tsuda Maru* case involved the fishing rights of Japanese fishermen. These individuals, as the case makes clear, were not residents within the territory of the United States and thus the case fits clearly within the authority distinguishing the rights of aliens within and without the territory of the United States. Further, the case involved a question of federal authority over international affairs, and the interpretation of the Fifth Amendment in that context.

The only contrary authority found is in the state court challenge to the statute in question in the instant case. In a ruling devoid of analysis, the Texas Court of Civil Appeals upheld the constitutionality of Section 21.031. *Hernandez v. Houston Ind. School Dist.*, 558 SW 2d 121 (Tex. Civ. App.—Austin, 1977, writ ref'd N.R.E.).

IV.

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal; alternatively, this Court should affirm the rulings of the courts below.

Respectfully submitted,

LAW OFFICE OF LARRY DAVES
Attorney at Law
P.O. Box 1115
Tyler, TX 75710
(214) 593-0184

VILMA S. MARTINEZ
PETER D. ROOS—Counsel of Record
Mexican American Legal Defense
and Educational Fund
(MALDEF)
28 Geary St., 6th Floor
San Francisco, CA 94108
(415) 981-5800

Attorneys for Appellees

Date: April 8, 1981.